NO. 21818

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

WALTER ADAMS,	)
	)
Appellant,	)
	)
vs.	)
	)
UNITED STATES OF AMERICA and CALIFORNIA STEVEDORE & BALLAST COMPANY,	)
	)
	)
Appellee.	)
	)

APPELLANT'S OPENING BRIEF

DORSEY REDLAND
JOHN A. McGUINN

1182 Market Street
San Francisco,

Attorneys for Appellant

SUBJECT INDEX

TABLE OF AUTHORITIES CITED

The jurisdiction of this Court lies under 28 U.S.C. §1291, by reason of the Notice of Appeal filed March 21, 1967, after final judgment entered and an order denying plaintiff's motions under Rule 52 (b) and 59 of the Federal Rules of Civil Procedure.

STATEMENT OF THE CASE

This is a libel in personam seeking damages for personal injuries sustained by plaintiff aboard the *U.S.N.S. PRIVATE JOSEPH F. MERRELL* (hereinafter referred to as *MERRELL*) while he was engaged in loading cargo.

Plaintiff's libel states two causes of action: Unseaworthiness of the vessel *MERRELL* and negligence of the defendant U.S.A.

The defendant United States of America, answered plaintiff's libel, denying its substantive allegations, and impleaded California Stevedore & Ballast Company, plaintiff's employer, as third-party defendant.

The matter was tried before the HON. ALBERT C. WOLLENBERG, Judge of the United States District Court for the Northern District of California. Judgment was rendered against plaintiff. Motions under Rules 52 (b) and 59 of Federal Rules of Civil Procedure were timely filed and denied. Notice of Appeal was timely filed.

STATEMENT OF FACTS

WALTER ADAMS is a negro longshoreman who has had the benefit of a fifth or sixth grade education (R.T. 50). He has been a longshoreman for more than twenty-three years (R.T. 48). On the night of April 23, 1962, he was employed by California Stevedore & Ballast Company, to load cargo aboard the vessel *MERRELL*, which was moored at the Oakland Army Terminal, Berth 6W. Plaintiff started to work at 7:00 p.m. in the No. 2 hatch, lower hold of the *MERRELL*. The loading process consisted of stowing large "conax" vans, about seven to nine feet in height, and then "topping off" with smaller cargo, i.e., hand stowing smaller cargo such as boxes of small arms ammunition on top of the conax vans up to the overhead or ceiling. After the conax vans were "topped off", a few more vans would be loaded in the hold and the "topping off" process repeated (R.T. 3-6). The small arms ammunition was loaded on wooden pallet boards known as Army boards. An Army board is a "four-foot by six-foot board constructed of *two by ten* or *two by eight* planking, with *four by four* stringers, double faced board" (R.T. 144, lines 16-23; R.T. 171, lines 19-25, emphasis added). A normal load of small arms ammunition on an Army board would weigh between 2000 and 2400 pounds and would consist of from thirty-two to thirty-six boxes depending on the weight and size of each box (R.T. 172).

These Army boards with their loads of small arms ammunition would be lowered into the hatch by means of the ship's winches. Eight longshoremen were assigned to the No. 2 hatch, lower hold, however, four men were doing the operation while the other four men rested. The four men who were working, were divided into two teams, one working the inshore side of the hold, the other the offshore side. There were two fork-lift trucks in the hold, one for each side of the hold (R.T. 6). When an Army board of ammunition would come into the hold, WALTER ADAMS would pick it up with the fork-lift truck and drive to the conax van. There he would hoist the Army board up into the air until it was level with the top of the conax van. After turning off the engine and blocking the wheels, he would climb up the fork-lift, step across the side of the Army board to the top of the conax van and help his partner, a fellow longshoreman, stow the cargo on top of the conax van (R.T. 6-7; 36-37). The partner would get to the top of the conax van by standing on the side or edge of the Army board as it was raised in the air. When it reached the level of the top of the conax van, he stepped off the Army board onto the van. This is a normal, customary method of getting longshoremen to the top of the van (R.T. 200-201; 54). On the opposite side of the hold, the same operation would be

taking place with another team of two longshoremen. This same operation was done the night before (R.T. 56, 57).

Approximately an hour after the operation started, as plaintiff was stepping across the Army board to the top of the conax van, one of the boards of the Army board broke causing plaintiff to fall to the deck below landing on his shoulder (R.T. 52, 53). As a result of the accident, the plaintiff was off work a little over three months (R.T. 71) and since returning to work, has been on dock exemption (R.T. 72-74).

SPECIFICATIONS OF ERRORS RELIED ON

1. The Fifth Finding of Fact of the District Court is not supported by the evidence.

2. The Sixth, Seventh and Eighth Findings of Fact of the District Court are not relevant to the issues which were tried by the District Court.

3. The Third Conclusion of Law of the District Court is erroneous in that, as a matter of law, the evidence establishes unseaworthiness of the vessel *MERRELL*.

4. The Fourth Conclusion of Law of the District Court is not supported by the evidence.

ARGUMENT

Appellant wishes to point out, at the onset, that the Findings of Fact and Conclusions of Law under scrutiny were prepared by counsel for appellee United States of America. Appellant realizes that this fact does not minimize the effect of the trial court's decision, however, he believes that it helps explain some of the incongruities contained in the Findings and Conclusions under discussion.

A. THE FIFTH FINDING OF FACT IS NOT SUPPORTED BY THE EVIDENCE.

Finding five quotes from section 9.67 of the Safety and Health Regulations for Longshoring, U.S. Department of Labor, (29 C.F.R. Part 9) which states, in part, that "pallets shall be of such material and construction and so maintained as to *safely support and carry* loads being handled on them " (our emphasis). In effect, this section imposes a standard of strict liability upon the shipowner or stevedore company. Most regulations, ordinances and the like contain specific standards or criteria. If one satisfies those specified standards initially he cannot thereafter be found to have violated the regulation. Here we have an opposite situation; a violation of the regulation can only be determined after the fact. In other words, to comply with this section one cannot

say that because the pallet is made of this kind of wood and of that size and constructed in this way it therefore meets the standards prescribed. The only test or standard for compliance with this section is, "did the board safely support the load."

The Court answers this question by saying that the board safely supported the *load* of small arms ammunition and failed only when plaintiff stepped on the edge. Therefore, the Court concludes, the board was fit for its intended purpose, i.e., "safely supporting the *load* of small arms ammunition" (our emphasis). Referring again to section 9.67 of the Longshore Regulations pallets must, "safely support and carry *loads*" (our emphasis). The term "loads" is not restricted to small arms ammunition or to inanimate objects or, for that matter, is it restricted to cargo. A man standing on a pallet board is just as much a "load" as is a box of small arms ammunition. It would be more than incongruous to say that the section was meant to protect inanimate objects placed on pallet boards but not animate ones.

Furthermore, the evidence is uncontradicted that pallet boards are intended to be used by longshoremen as a means of carrying or conveying them to working places above the deck (R.T. 200, 201). Indeed, the only adverse witness

who testified as to the use of pallet boards as a means of getting to working places above the deck was K. B. GRANSTEDT. He was asked at page 200, lines 16-21:

> "You stated that these men would sometimes go up on the lift on a board. Would they go up on an empty lift, on the forks?

His reply:

> "They're not supposed to go up on forks. *If you have a load there they'll step on,* or if you have an empty board there they'll step on" (emphasis ours).

In addition to the undisputed testimony of the witnesses, General Industry Safety Orders, #3299.8, *Safety Orders Applicable to Longshore and Waterfront Operations,* State of California, June 1957 (page 14), states:

> "Pallets shall be constructed and maintained with strength adequate for the loads being handled. They shall be kept in good repair. *Pallets upon which employees customarily walk* shall have *no surface* opening in excess of two inches in width" (our emphasis.)

This section is a clear legislative expression that pallet boards are walked upon by longshoremen. Neither of the sections referred to above limit the adequacy of the strength of the boards to their centers. In fact, the latter section, by using the words "no surface", indicates that the entire pallet board must be of adequate strength. The par-

ticular board in question was four feet by six feet in length and width, and constructed of two inch by ten inch or eight inch planking with four inch by four inch stringers, double faced (R.T. 144). The board was designed to hold loads in excess of twenty-four hundred pounds (R.T. 172). The side or edge of the pallet board is the area where the bridle is attached; and the side or edge of the pallet board supports the weight of the load when being lowered into the hold (R.T. 34, lines 23-25; R.T. 35, line 1). Longshoremen are expected to stand or walk upon the edge of these boards (R.T. 200, lines 16-21); there is no reason for them not to if the board is safe (R.T. 200, lines 24-25; R.T. 201, lines 1-3). In short, there is no rule, no reason and no evidence which limits the adequacy of protection to one portion of the pallet board.

No one has stated the issue more clearly than appellant: "If that board don't break, I don't fall!" Unfortunately, the Court below never decided the issue; instead, most of its time was spent in a casuistical analysis of non sequiturs.

B. THE SIXTH, SEVENTH AND EIGHTH FINDINGS OF FACT ARE IRRELEVANT TO THE ISSUES WHICH WERE BEFORE THE LOWER COURT.

The Court concludes in the sixth finding of fact

that if all eight men in the lower hold had been working simultaneously, the appellant would not have had to leave the seat of the fork-lift. The seventh finding of fact concludes that the "four on, four off" practice was a proximate cause of the accident. The eighth finding of fact concludes that the leaving of the driver's seat of the fork-lift with the forks in the air was a proximate cause of the accident. And the fourth conclusion of law embodies the essence of each of these findings. Each conclusion in finding six, seven and eight fails to mention that if the board did not break, the accident would not have happened.

In each finding, the Court concludes that the plaintiff indulged in an unsafe or improper practice, yet every alleged improper practice had ceased or come to rest by the time he stood on the pallet board. Thus, at the time the board broke and appellant fell, the fact that four men were working instead of eight is irrelevant. The evidence clearly demonstrates that whether four men are working or eight men, they still must use the pallet board as a means of getting to the top of the conax van. Similarly, if leaving the seat of a fork-lift with a load suspended is improper, the impropriety of this[3] activity ceased or came to rest before he stepped on the pallet, e.g., if appellant fell because he stood on the seat of the

fork-lift or if he fell while climbing up the fork-lift or if, in leaving the fork-lift unattended, it rolled back and hit him, then it might be said that plaintiff's activity was a proximate cause of the accident. But here each of those possibilities disappeared: he had safely reached the pallet board. The board would have broken when plaintiff stood on it with or without a driver seated behind the wheel of the fork-lift.

Clearly, appellant was a member of a class for whom safe and adequate pallet boards were intended; clearly, it is foreseeable that longshoremen are expected to stand on pallet boards be it the middle or on the side of them. Just because appellees did not foresee that it was WALTER ADAMS who was going to step on the pallet board instead of another longshoreman should not defeat their liability.

C. THE VESSEL WAS UNSEAWORTHY AS A MATTER OF LAW.

The Court below never decided if the pallet board broke. Yet it erroneously concluded in the third conclusion of law that the evidence did not establish that the *MERRELL* or its appurtenances were unseaworthy. Opposing counsel, in their "Memorandum in Support of Proposed Findings of Defendant United States" at page 2, lines 3-6 (page 136 of the Transcript of Record), state:

> "But a finding by the Court as to whether or not the board broke is not determinative of the issues presented. Even if the pallet board did break, it does not establish that the vessel was unseaworthy."

And again at page 3, lines 11-15 (page 138 of the Transcript of Record):

> "The Goverment's proposed findings do not require that the Court act on the issue of whether or not the pallet board broke. Rather we suggest that the Court need only reach the issue of whether or not the board was reasonably fit for its intended purpose."

It is appellant's position, as heretofore stated, that the Court must decide if the board broke before it can decide if it were reasonably fit for its intended purposes and therefore whether or not the vessel was unseaworthy.

A case of striking similarity to this one is *Reed vs. THE YAKA*, (D.C. Pa. 1960) 183 F. Supp. 69. There a longshoreman was standing on pallet boards, used as staging, in order to help guide drafts of cargo being lowered into the hold. While standing on one of the pallet boards, it broke causing Reed's right foot to fall through the boards thus twisting his ankle.

The Court, sitting in Admiralty, found that, "The sole cause of this injury was the latent defect in the wooden pallet being used for staging." The Court therefore concluded

that, "The *S.S. YAKA* was unseaworthy."[1] The rule of the *YAKA* case squarely embodies the facts of this case.

CONCLUSION

The decision of the lower Court is contrary to the law and the evidence. Most of the evidence set forth in the Findings of Fact is completely irrelevant to this case. The issue which should have been decided, was not decided. If it had been decided, WALTER ADAMS would not be an appellant. Either the board broke or it did not. If it did, then the vessel *MERRELL* was unseaworthy. *Reed vs. THE YAKA, supra.*

It is respectfully requested that this case be reversed and a new trial ordered.

---

[1] This case was reversed by the Third Circuit on different grounds. 307 F. 2d 203, 1963 A.M.C. 672. Thereafter, the United States Supreme Court reversed the Third Circuit. 373 U.S. 410, 1963 A.M.C. 1373.

Dated: San Francisco, California, September 23, 1967.

Respectfully submitted,

DORSEY REDLAND
JOHN A. McGUINN

Attorneys for Plaintiff and Appellant

CERTIFICATE OF CONFORMANCE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and in my opinion the foregoing brief is in full compliance with those rules.

DORSEY REDLAND